IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.01.2009

C O R A M

THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR

Contempt Petition No.464 of 2007

L.Gauthamchand Jain ... Petitioner
Vs.

1.Messrs. Srishti Estates and Investments
Private Ltd., by its Director Sakthivel.

2.V.Subbiah, Managing Director,
Messrs.Srishti Estates and Investments
Private Ltd. ... Respondents

Petition filed under Section 11 of Contempt of Court Act to punish the respondents for contempt under the relevant provisions of the Contempt of Court Act in respect of order of this Hon'ble Court dated 13.02.2007.

For Petitioner : Mr.V.R.Sridaran

For Respondent : M/s.M.Soundar,
K.Ashok Kumar.

O R D E R

The petitioner in the contempt petition had filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 against the first respondent herein represented by its Director Sakthivel, for an order of interim injunction restraining the respondent therein and anybody claiming under them from alienating the petition mentioned property or dealing with the same in any manner pending disposal of the Arbitration proceedings. This court initially passed by an order dated 18.08.2006 granting adinterim injunction for a period of three weeks, i.e. upto 08.09.2006 from alienating the property described in the Schedule attached to the said application. In the said application, the first respondent herein filed a counter affidavit stating that the first respondent did not have any intention to alienate and undertaking that it will not alienate 10,600 sq.ft. undivided share from out of 2.58 acres of land including 8950 sq.ft. already conveyed to the petitioner herein and his family members by the first respondent company under the sale deed dated 01.09.2003 registered as Document No.2788 of 2003 and four sale deeds dated 27.08.2003 registered as Document Nos.2711, 2712, 2713 and 3076 of 2003 in the office of the Sub Registrar, Neelankarai. Contending that the said undertaking was falsely given knowing fully well that the first respondent had already parted with the entire property, the petitioner has come forward with this Contempt Petition. The said contention of the petitioner has been strictly denied by the respondents in their counter affidavit.

The argument advanced on both sides were heard. Affidavit, Counter Affidavit, Petitions and connected papers relied on by both parties were perused and taken into consideration.

2. The first respondent company floated a project of constructing Semi Independent Cluster Houses spread over an extent of 2.58 acres. The project involves construction of more than 80 such units. The petitioner is said to have entered into an agreement with the first respondent for the purchase of two such units, whereas his family members, four in number, entered into similar agreements for purchasing four such units. The agreement contains a clause for referring any dispute arising between the promoters and the agreement holders to an arbitrator named in the agreement. As per the agreement, the petitioner was entitled to get two such units constructed for him along with the conveyance of an undivided share in the land to an extent of 1780 + 1780 = 3560 sq.fts. Similarly, four of the members of the petitioner family were entitled to get four such units constructed and allotted for them besides a total extent of 1780 x 4 = 7120 sq.fts. undivided share in the land to be conveyed to them by way of sale deeds.

3. Admittedly, the undivided shares relating to five such units have already been conveyed to the petitioner and his family members, viz. Dharamchand Jain, Bawarlal Jain, Ashok Kumar Lodha and G.Manjula, vide sale deeds registered as Document No.2788 dated 01.09.2003 and Document Nos.2711 of 2003, 2712 of 2003, 2713 and 3076 of 2003, all dated 27.08.2003 registered in the office of the Sub Registrar, Neelankarai. In the first phase of development, the first respondent constructed a number of such units out of which one such unit was given to the petitioner and four such units were given to the family members of the petitioner. Unable to complete the entire project, after effecting the proposed development in a portion of the property, the first respondent chose to hand over the development of a part of the project to another entrepreneur by name Saksha Asset Holding and consequently executed two sale deeds in favour of the said Saksha Asset Holding conveying 85 cents (23 + 62 cents) out of the total extent of 2.58 acres. Thereafter, the applicant came forward with an application, namely in O.A No.642 of 2006 praying for an injunction under Section 9 of the Arbitration and Conciliation Act, 1996 in which intially, an order of interim injunction was granted. However, after service of notice, the first respondent herein entered appearance and filed a counter affidavit as well as an additional counter affidavit undertaking not to alienate 10,680 Sq.ft. (1780 x 6) undivided share out of the total extent of 2.58 acres covered by the project. Out of the above said undivided share of 10,680 sq.ft., 8900 sq.ft. relating to five units had already been conveyed to the petitioner and four of his family members in five sale deeds as indicated supra. Recording the said undertaking, this Court passed an order on 13.02.2007 closing the application as no orders were necessary. The undertaking given by the first respondent and recorded by this court reads as follows -

" Without prejudice to all that have been stated in the counter affidavit and the aditional counter affidavit, the respondent Company undertakes that, subject to arbitration, it has no intention to alienate and that it will not alienate 10,680 sq.ft. (1,780 x 6) undivided share from out of 2.58 acres (258 cents) of land out of which 8,950 (1780x5) has already been conveyed to the applicant, Mr.Ashok Kumar Lodha, Mr.L.Dharamchand Jain, Mr.L.Bhawarlal Jain and Mrs.Manjula by the respondent company vide sale deeds dated 01.09.2003 registered as document No.2788 of 2003, doc.No.3076 of 2003 dated 22.9.2003, Doc.Nos.2711 of 2003, 2713 of 2003 and 2712 of 2003 all dated 27.8.2003, in the office of the Sub-Registrar Neelankarai. The respondent further undertakes that it shall not alienate the access roads/common areas relatable to the above said units of the applicant and 4 others. This is without prejudice to the rights of the respondent in Arbitration proceedings regarding the number of units (whether it is 5 or 6) for which agreements were entered into by applicant and 4 others. "

4. Contending that the first respondent Company and the second respondent viz. Managing Director of the first respondent company, having completed the first phase of the project spread over an extent of 1.73 acres and conveyed the remaining extent of 85 cents to Saksha Asset Holding, falsely gave an undertaking not to alienate an undivided share of 10,680 sq.ft. of land out of the total extent of 2.58 acres, knowing fully well that they had no more property to be conveyed and that thereby the respondents have committed contempt of Court, the petitioner has come forward with the present contempt petition praying that the respondents should be punished for the alleged act of contempt. The act of contempt alleged by the petitioner is that, the respondents, having already parted with the entire property, falsely gave an undertaking to the Court not to alienate an undivided share of 10,680 sq.ft. out of 2.58 acres, giving an impression as if they were still holding such undivided share in the property capable of being conveyed. The above said contention of the petitioner seems to be untenable for the following reasons.

(1) The undertaking itself clearly recited that out of 10,680 sq.ft. referable to six units, 8950 sq.ft. referable to five units had already been conveyed to the petitioner and four of his family members under five sale deeds dated 01.09.2003 and 27.08.2003. Therefore, regarding the remaining 1780 sq.ft. undivided share alone sale deed had not been executed.

(2)What was conveyed in the Sale Deeds dated 04.02.2004 and 10.09.2004 executed by the first respondent to Saksha Asset Holding was an undivided share of 85 cents (23 cents and 62 cents respectively) out of the total extent of 2.58 acres.

(3)The contempt petition has been filed on the assumption that 85 cents within defined boundaries was conveyed by the respondent in favour of Saksha Asset Holding, whereas in fact it is not so.

6.The learned counsel for the contempt petitioner would contend that the project was taken up in stages; that the first phase development was made in an extent of acre 1.73 covering the area over which the constructed units stand and the portions earmarked for open space, streets, etc. that the area over which the constructed unit stand alone account for acre 1.40; that the remaining extent available after the space utilised for first phase development was only 85 cents; that the entire extent of 85 cents was sold in favour of Saksha Asset Holding; that on the date of giving undertaking, the respondent did not have any undivided interest in the property capable of being conveyed by them and that the said undertaking itself was deliberately given with a view to prevent an order of interim injunction being granted. If at all, the contention of the petitioner that the entire extent of the project had already been alienated by the respondent can be accepted, then even without such an undertaking, no injunction would have been granted against the respondents since before filing of the Original Application for injunction, according to the admission of the petitioner, the respondents did not have any alienable interest in the property. If it is so, then the application in O.A. No.642 of 2007 can be held to be one filed under a mis-consumption as if the respondent had the power of alienation in respect of the property. On the basis of the contention of the petitioner itself, the injunction sought for could have been refused as the entire property had allegedly been alienated before filing of the Original Application.

7. Even assuming that the respondent did not have any alienable interest in the property as on the date of giving the undertaking, there is nothing wrong in the respondent□s giving an undertaking not to alienate the property which is the subject matter of the petition, expressing absence of intention to execute any document alienating such property. An injunction can be sought for by a person claiming title to the property against the respondent who does not have title to the property or right of alienation in respect of the property. In such cases, the respondent can avoid an order of injunction being passed against him by stating that he does not have any intention to alienate the property. Such an undertaking does not mean that he asserts having such an alienable interest.

8. In this case, as revealed by the recitals found in the sale deeds dated 04.02.2004 and 10.09.2004 executed by the first respondent in favour of Saksha Asset Holding, it is obvious that the first phase of development was completed and sale deeds covering 1.40 acres of undivided share in the entire property had been executed. The extent mentioned therein, namely 1.40 acres is not confined to the area over which the building units stand. It also includes the share in the open space, streets and other common lands. The entitlement of the purchasers of building units to an extent of undivided share (in respect of the petitioners and his family members of 1780 sq.ft. each) does not refer to the plinth area of the building. It includes the common share in the above mentioned open space, street and other common area meant for the use of allottees of all the units as well. Therefore, by necessity, the plinth area of each unit shall be less than the extent of common share in the lands. The total extent of the land is admittedly 2.58 acres as per the recitals found in the above said sale deeds. Undivided share of 1.40 acres alone had been conveyed as per the recital found in the above said sale deeds. The undivided share conveyed to Saksha Asset Holding under two sale deeds dated 04.02.2004 and 10.09.2004 is 0.85 acres. Therefore the total undivided share already conveyed comes to 2.25 acres, which includes 8950 sq.ft. already conveyed to the petitioner and his family members. Even if that 8950 sq.ft. (approximately 20 cents) undivided share is not to be included in 1.40 acres of undivided share said to have been conveyed as per the recitals found in the above said sale deeds, the the remaining extent available shall be 3.3 cents out of which the claim of the petitioner and his family members shall come to 24 cents approximately and excess extent of 9 cents shall be available.

9. However, the learned counsel for the petitioner would contend that the total extent of area utilised for phase 1 development including the common area was 1.73 acres and the sale deeds executed in favour of Saksha Asset Holding were in respect of 85 cents and hence the entire extent of 2.58 acres was covered and no area was left with the first respondent after the sales made to Saksha Asset Holding and that hence the undertaking was nothing but a conscious misrepresentation.

10.Per contra, the learned counsel for the respondent would contend that though the development would have been made in phases, the undivided shares to be conveyed to the allottees are not confined to any particular area; and that every allottee is entitled to a common share in the undivided land of the total extent of 2.58 acres. It is also the contention of the learned counsel for the respondent that even after the development and sales made by the respondents and Saksha Asset Holding who have taken over the project from the respondents, there are still balance land available for locating the units for the petitioner. The learned counsel for the petitioner submitted that after the development of first phase by the first respondent and the second phase development made by Saksha Asset Holding, no area was left for locating the units to be allotted to the petitioner and his family members and that hence the undertaking given by the respondents should be held to be a false one and thus an act of contempt. In this regard, this Court directed the respondents to produce the plans for the development of the property into housing units and point out the left out portion wherein, the units for allotment to the petitioner and his family members can be located. The respondents have produced the plan and pointed out a portion in which such units can be located. We are not concerned with the question where the units for allotment to the applicant and his family members can be located. On the other hand, we are concerned with the question whether the undertaking given by the respondents in O.A.No.642 of 2006 was with a deliberate intention to misguide the court as if the respondents did have the power of alienation in respect of an area regarding which such undertaking was given.

11.As pointed out earlier, the undertaking could not be construed to be an assertion that the respondents did have the power of alienation as on the date of such undertaking to alienate the property. In the undertaking itself, it was made clear that out of 10680 sq.ft., 8950 sq.ft. had already

been conveyed to the petitioner and his family members. Therefore, the same can be at best be construed to be a statement to the effect that the respondents had the power of alienation in respect of 1780 sq.ft. alone referable to one unit agreed to be allotted to the petitioner. So far as the other five units are concerned, the undertaking itself makes it clear that the title had already been conferred on the petitioner and his family members. Hence, the undertaking not to alienate 8950 sq.ft. undivided share cannot be construed to mean an assertion that the respondents had the power of alienation, but still they would refrain from alienating the same. So far as the remianing extent of undivided share of 1780 sq.ft. is concerned, the respondents have the proof that, after all alienations, sufficient space is available for being conveyed to the petitioner if he succeeds.

12.In this regard, this Court has to take into consideration the fact that though the application under Section 9 of the Arbitration and Conciliation Act was filed in 2006 itself stating that the dispute between the first respondent and the petitioner has to be referred to an arbitrator as per the agreement between the parties when the first respondent company expressed its willingness to refer dispute for settlement by an arbitrator named in the agreement, the petitioner seems to have filed an application under Section 11 of the Arbitration Act for appointment of an arbitrator by the court. The said application was also returned pointing out certain defects and the same is yet to be represented. In view of all the above said aspects, this court has to necessarily come to the conclusion that the present contempt petition has been filed with an ulterior motive and also under a mis-consumption, perhaps a fainted mis-consumption in order to coerce the respondents to come to terms and that the petitioner has not made out a clear case of contempt. It is not the case of the petitioner that the undertaking given was subsequently violated. Under such circumstances, this court comes to the conclusion that there is no merit in the contempt petition and the same deserves to be dismissed.

Accordingly, the contempt petition is dismissed.

19.01.2009
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Index: Yes/No
Internet: Yes/No
P.R.SHIVAKUMAR, J.
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PRE DELIVERY ORDER IN
Contempt Petition No.464 of 2007

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